

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KANYAMA HAMPTON,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 262956

Wayne Circuit Court

LC No. 04-011943-01

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and second-degree murder, MCL 750.317. Defendant was sentenced, as a third habitual offender, MCL 769.11, to one to five years' imprisonment for the assault with intent to do great bodily harm less than murder and felon in possession of a firearm convictions, two years' imprisonment for the felony-firearm conviction, and 225 to 500 months' imprisonment for the second-degree murder conviction. We affirm.

Defendant first argues he was denied his constitutional right of due process of law when his prior conviction was admitted into evidence. However, defendant waived appellate review of this issue when he stipulated below that he was a felon ineligible to possess a firearm. *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001).

We also reject defendant's contention that the prosecutor improperly commented on the stipulation. During closing argument, the prosecutor only stated to the jury that there was a stipulation that defendant was a convicted felon who had not regained his right to possess a gun. The prosecutor did not disclose the nature of defendant's prior conviction at anytime to the jury. Therefore, the prosecutor's comments were not improper.

Defendant next argues that the trial court erred in ordering him to pay restitution in excess of \$9,000. We disagree. Generally, this Court reviews a trial court's award of restitution for an abuse of discretion. *People v Dewald*, 267 Mich App 365, 378; 705 NW2d 167 (2005). However, defendant failed to object to the restitution order at the time of sentencing, and therefore, this Court's review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A sentencing court may order a defendant convicted of a felony to make restitution to the victim of the defendant's conduct. *People v Griffis*, 218 Mich App 95, 103; 553 NW2d 642 (1996); MCL 769.1a(2). Restitution should only compensate for “losses that are (1) easily ascertained and measured and (2) a direct result of the defendant's criminal acts.” *People v Byard*, 265 Mich App 510, 513; 696 NW2d 783 (2005), quoting *People v White*, 212 Mich App 298; 316; 536 NW2d 876 (1995). The restitution amount should be based upon the evidence. *People v Guajardo*, 213 Mich App 198, 200; 539 NW2d 570 (1995).

Defendant's claim that the restitution amount was unsupported by the record is without merit. The court ordered defendant to pay restitution based on the amount in the presentence investigation report (PSIR). At sentencing, defendant did not contest the amount estimated in the PSIR. The trial court was entitled to rely on the PSIR amount because that amount “is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information.” *People v Grant*, 455 Mich 221, 233-34; 565 NW2d 389 (1997). The PSIR recommended restitution in the amount of \$9,315. Terrance Smith's funeral expenses were estimated at \$3,315 and Amos Ragland's medical expenses were estimated to be in excess of \$6,000. “Absent a dispute, the court was not required to make express findings regarding the amount of restitution.” *Id.* at 235. The restitution amount was supported by the record, and therefore, defendant's claim is without merit.

Defendant's final argument on appeal is that prosecutorial misconduct denied him a fair trial. Defendant argues that the prosecutor improperly shifted the burden of proof to him during closing argument when she placed the burden on him to explain the whereabouts of the gun used in the shooting of Ragland and Smith. We disagree. Where issues of prosecutorial misconduct are not preserved, this Court reviews the record for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Issues of prosecutorial misconduct are considered “on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of the defendant's arguments.” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). It is well settled that a prosecutor is “given great latitude to argue the evidence and all inferences relating to his theory of the case.” *Id.* at 456. This Court has found that “a prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence.” *Ackerman, supra* at 450. However, a prosecutor may not comment on a defendant's failure to present evidence, i.e., the prosecutor may not attempt to shift the burden of proof. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). It is also improper for a prosecutor to “express a personal belief in the guilt of the defendant.” *People v Farrar*, 36 Mich App 294, 299; 193 NW2d 363 (1971).

Defendant takes issue with the prosecutor's statement, “what I can tell you is from the investigation in this case that the defendant was smart enough to get rid of that gun that he shot both of these gentlemen with.” Defendant also takes issue with the statement, “this defendant is smart enough to get away, get rid of the murder weapon, and keep himself away from the police long enough to get his story together.” Defendant has failed to show that the prosecutor's statements were improper, and therefore, defendant has failed to show prosecutorial misconduct. The prosecution presented evidence showing that defendant shot Ragland in the leg and fatally shot Smith in the back. Ragland identified defendant as the person responsible for shooting him and Smith. Defendant's home was searched the day after the shooting. Although no weapon

was recovered from defendant's home, weapon accessories were found. Within defendant's home a box of ammunition for a 9 millimeter was found in the kitchen area, a weapon's brush, and bullets for a .380 automatic were found near the fireplace mantel.

The prosecutor's closing argument was not improper, but rather, addressed the prosecution's lack of physical evidence to connect defendant to the shooting. A prosecutor may argue the evidence and draw reasonable inferences that may arise from the evidence. *Thomas, supra* at 456. Because no weapon was recovered from the scene of the shooting or defendant's home, the prosecution was unable to establish a physical connection between defendant and the weapon used in the shooting. The prosecutor was free to argue that given the lapse in time between the shooting and the search of defendant's home, it was possible for defendant to dispose of the weapon used in the shooting. The prosecutor's argument did not shift the burden of proof to defendant, but rather, sought to explain why the prosecution lacked physical evidence to support its case. The prosecutor's closing argument never implied to the jury that defendant had the burden of disproving an element of the offense charged. *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995). The closing argument also did not imply that defendant had the burden of producing evidence to prove his innocence.

Even if the prosecutor's closing argument could be characterized as improper, any minimal prejudice was cured by the trial court's instructions that the jury had to decide the case on the evidence and that the remarks of counsel were not evidence. *Thomas, supra* at 456. The court also instructed the jury that the burden to prove the elements of the crimes charged rested with the prosecution. Therefore, any misconduct would not warrant reversal.

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski